

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

W. J. Hibsher

77-6186

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To be argued by
WILLIAM J. HIBSHER

United States Court of Appeals FOR THE SECOND CIRCUIT

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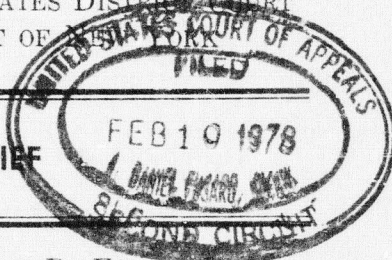
Docket No. 77-6186

ROBERT V. RAFTER,
Plaintiff-Appellant,
—against—

FEDERAL BUREAU OF INVESTIGATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF



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ROBERT V. RAFTER,
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—against—

FEDERAL BUREAU OF INVESTIGATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellee.

APPELLEE'S BRIEF

Preliminary Statement

Plaintiff-appellant, Robert V. Rafter, has brought this appeal from a judgment of United States District Court for the Southern District of New York (Frankel, J.), dated and filed August 19, 1977, granting defendant-appellee's motion for summary judgment in an action in which plaintiff sought records from the Federal Bureau of Investigation ("FBI") pursuant to a Freedom of Information Act—Privacy Act request. Judge Frankel's judgment was based on a written opinion. (110a-113a.)* Plaintiff also appeals from the District Court's August 19, 1977 endorsement denying plaintiff's motion for re-argument. (129a.)

* References to the joint appendix to briefs of appellant and appellee will be as follows: " — a- — a."

Issue Presented

Did the District Court correctly grant defendant summary judgment dismissing the complaint?

Statement of Facts

Prior Proceedings

By letter dated August 23, 1976 directed to the FBI's New York office, plaintiff Robert V. Rafter requested "disclosure of any file information maintained [on him] by the Bureau." (36a.) The FBI acknowledged Mr. Rafter's Freedom of Information Act ("FOIA")-Privacy Act ("PA") request and requested further information necessary to process his application. (37a.) Mr. Rafter supplied the requested information; the FBI acknowledged his submission. (38a-39a.) Then, pursuant to a Department of Justice regulation, 28 C.F.R. § 16.57, the New York office's file on Mr. Rafter was forwarded to Washington for processing.*

On December 22, 1976, Mr. Rafter followed his initial request with a request to copy his file in New York. He was advised by letter dated October 1, 1976, that the FBI, in accordance with regulation, was processing all requests in chronological order of receipt and of the substantial backlog of FOIA requests that the FBI was experiencing. (Howard Aff., ¶¶ 11-12, at 22a, 41a-42a.)

On March 8, 1977, not having received his file as yet and acting as attorney *pro se*, plaintiff commenced the instant action in the District Court seeking an order compelling production of the information he had sought

* For a discussion of FBI procedure upon receiving a FOIA-PA request, see affidavit of John E. Howard ("Howard Aff.") at 20a-47a. Mr. Howard is chief of the FBI's FOIA-PA Initial Processing Unit.

from the FBI and an award of money damages. On April 5, 1977, plaintiff moved for partial summary judgment, seeking a court order compelling disclosure immediately.

On May 1, 1977, plaintiff noticed the depositions of defendant through four named individuals, Mssrs. Laprade, Hawkes, Caswell and Cashin. On the same date, plaintiff noticed the deposition of a third-party witness, James Porter, Esq., chief counsel to the Association of the Bar of the City of New York.

On April 27, 1977, defendant filed a timely answer to the complaint; and on May 19, 1977, defendant filed a motion to dismiss the complaint, alternatively, for summary judgment, on the ground that plaintiff had failed to exhaust his administrative remedies;* at the same time, defendant filed a motion for a protective order staying all discovery.

On June 14, 1977, following two oral arguments on the motions, the District Court stayed all proceedings in the action until June 27, 1977, by which time the Court expressed its expectation that defendant would have voluntarily provided the information sought by plaintiff.

* In the alternative, defendant also sought a judicial stay of the proceeding—pursuant to the “exceptional circumstances” provision of 5 U.S.C. § 552(a)(6)(C) and *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)—on the grounds that numerous FOIA-PA requests had created huge backlogs, that the FBI was processing the requests in chronological order, and that the FBI anticipated reaching plaintiff’s request within several months. Defendant also moved to dismiss the complaint on the ground that plaintiff had not exhausted his administrative remedy prior to commencing the action in District Court. See discussion *infra*.

Expedition of Plaintiff's FOIA-PA Request

At the time of the commencement of plaintiff's action in May, 1977, the FBI was backlogged approximately 11 months with FOIA requests, processing in May, 1977, requests made in June, 1976. (Howard Aff., ¶ 26, at 33a.) At Judge Frankel's urging that plaintiff's request be expedited, the FBI produced Mr. Rafter's file in mid-June.

The FBI forwarded to plaintiff all requested information and records prior to the date set by the Court, with the exception that identities of FBI agents who had worked on an investigation requested by plaintiff in the mid-1960's were excised. Despite receipt of the requested documents on June 27, 1977, plaintiff moved for an order compelling discovery—specifically for the appearance for deposition of the four FBI agents plaintiff had noticed, as well as Mr. Porter of the Bar Association.

On July 13, 1977, defendant renewed its motion for summary judgment, filing a local Rule 9(g) statement, (59a-60a,) as well as the affidavit of Special FBI Agent Thomas W. Richardson ("Richardson Aff.") which contained copies of the documents turned over to plaintiff with the excision of the identities of FBI agents as exhibits. (64a-109a.) Mr. Richardson, the agent in charge of processing all FBI FOIA-PA requests, stated that by letter dated June 14, 1977, the FBI had supplied Mr. Rafter with all the information he had sought, with deletions as indicated, and had informed him of the procedure to be followed in appealing that production. (Richardson Aff., ¶ 15, at 67a.) Mr. Rafter never appealed to the agency.

The Richardson Affidavit described the process used by the FBI in searching its files for information relating to FOIA requests, as well as the basis for the excision of FBI agents' identities from the materials turned over to

Mr. Rafter. (Richardson Aff. ¶¶ 16-17, at 67a-68a.) Mr. Rafter's request had been processed by thoroughly searching the General Indices of the FBI's Central Records System, both the "main" and "see" cards reflecting files in which an individual is either the subject or merely referred to in a file. (Richardson Aff., ¶¶ 16 and 17, at 68a.) Plaintiff was provided with copies of all FBI documents on him with FBI agents' identities omitted.

Summary Judgment Granted

On August 19, 1977, the District Court issued its opinion granting defendant's motion for summary judgment. The opinion upheld the excision of FBI agents' identities,* and dismissed the complaint on the grounds that all of the information sought had been turned over to plaintiff and that there had been no contrary indication "generating a genuine issue of fact." (111a.) Judge Frankel alternatively held that plaintiff had failed to exhaust his administrative remedies. (112a.) The District Court's opinion also denied the depositions plaintiff had sought on the ground that plaintiff would not be permitted, on the basis of a mere assertion that there may be more records, to interrogate agency personnel. (113a.) The Court, in granting summary judgment to defendant, stated as follows:

The F.B.I. has now delivered to plaintiff its file on him, complete except in one particular to be noted below. At least, it is declared on oath by a

* Plaintiff does not appeal the denial of disclosure of FBI agents' identities.

responsible agent charged with FOIA compliance that the file is complete, and there is no contrary indication generating a genuine issue of fact. The agent covers this subject in full and circumstantial detail, describing the procedures for file searches for this situation and swearing to careful fulfillment of these procedures. Plaintiff's conclusory averment that "there are other records" cannot be thought to tender a triable issue or to justify the series of depositions he proposes. (110a-111a.)

* * *

The effort to take depositions must be overridden. The mere assertion, with no semblance of specificity, that there may be more records cannot be accepted as a basis for either keeping cases like this one alive or for allowing routinely the interrogation of agency personnel. (113a.)

Thus, with the Richardson Affidavit establishing the fact that defendant had received his requested disclosure and in the absence of any factual allegation that other records on plaintiff existed, the Court granted defendant's motion for summary judgment and denied depositions. An alternate ground for the Court's holding was plaintiff's failure to exhaust administrative remedies as required by law. See 5 U.S.C. §§ 552(a)(6)(A)(1); 552a(f)(2), (4); 704; 28 C.F.R. §§ 16.7, 16.47, 16.48.

Plaintiff prosecutes the instant appeal on the ground, not that the deletion of the FBI agent's name was improper, but rather that the disclosure provided was not the complete file in the possession of the FBI on him. Plaintiff now argues that the exhaustion requirements of the Freedom of Information Act and Privacy do not apply to individuals who merely seek records under the

Privacy Act. Plaintiff also alleges that the records produced are inaccurate and cites instances of the alleged inaccuracies (115a-116a), though he never requested that the agency correct the inaccuracies. Finally, plaintiff seeks damages for the allegedly intentional falsification of records.

A R G U M E N T

The District Court Correctly Granted Summary Judgment to Defendant.

During the pendency of this action in which plaintiff sought an order from the District Court compelling defendant to produce its file on him pursuant to plaintiff's FOIA-PA request, and while defendant's motion to dismiss for failure to exhaust administrative remedies was pending, the FBI complied with plaintiff's request, providing him with copies of all FBI documents relating to him.*

Following production, plaintiff moved to compel the depositions of four named FBI officials and the Counsel to the Bar Association generally claiming a need to obtain facts which would prove the existence of other records allegedly not disclosed as well as plaintiff's allegations that the records produced failed to meet accuracy and fairness standards set forth by statute. Plaintiff

* The only deletions from records forwarded to plaintiff were the names of special FBI agents responsible for an investigation initiated in 1967 at plaintiff's urging based on plaintiff's allegations that local law enforcement officials had engaged in a conspiracy to violate his civil rights by attaching his car in the context of legal actions arising from plaintiff's lease of a summer residence. The exemption of FBI identities pursuant to 5 U.S.C. § 552(b)(7)(C), which permits the deletion of material which would "constitute an unwarranted invasion of personal privacy," was upheld by the District Court and is not appealed here.

also argued that since his complaint sought damages, he was entitled to discovery on the issue of intent.*

Judge Frankel granted defendant summary judgment and denied plaintiff's effort to depose the noticed individuals.

A) The District Court Properly Rejected Plaintiff's "Conclusory Averment" And Granted Summary Judgment.

In the face of the disclosure which occurred during the pendency of this action, plaintiff's general allegations that additional records exist was properly rejected by Judge Frankel. If plaintiff suspected that additional FBI files existed concerning his activities, he should have alleged the specific nature of these activities, or the basis of his belief that further files existed.** In the letter accompanying plaintiff's file, the FBI advised plaintiff of his administrative appeal remedies and invited him to submit additional information in the event he believed additional records existed:

* It is noted that 5 U.S.C. §§ 552(a)(4)(E), 552a(g)(2)-(B) and 552a(g)(3)(B) only permit an award of attorneys fees to a requester under certain circumstances. Section 552a(g)(4) of 5 U.S.C., allows a monetary award for actual damages sustained by an individual, however, plaintiff fails to allege any actual damage. Furthermore, no allegations pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *on remand*, 456 F.2d 1339 (2d Cir. 1972), are contained in the complaint nor are individual defendants named which could even arguably warrant consideration of the issue of intent referred to in Appellant's Brief at 6.

** Furthermore, such allegations, as the District Court correctly stated as an alternate basis for dismissing the complaint, should have been made to the agency in the first instance. See discussion of plaintiff's failure to exhaust administrative remedies *infra*.

If you believe your name may also have been recorded by the FBI incident to the investigation of other persons or some organization, please advise us of the details describing the specific incident or occurrence and time frame. Thereafter, further effort will be made to locate, retrieve and process any such records. (87a.)

Plaintiff failed to provide the FBI or the District Court with anything beyond general allegations that other records existed; no leads were offered by plaintiff. Indeed, following production, plaintiff candidly admitted in his memorandum in support of his motion to reargue that he was surprised at the paucity of the file:

I agree the FBI report is thin. *I had thought there would be more.* I had thought there would be inquiry of the High Sheriff with respect to whom the clerk of court required I delete the written records clause of his subpoena *duces tecum* (appended) before he would sign it, and who testified 10 April 1975 on trial that he had no records. (116a) (emphasis added).

Thus, plaintiff's only specific reference to possible FBI files concerning him relates to the very investigation into plaintiff's mid-60's complaint to the FBI that local law enforcement officials had violated his civil rights which was the subject of the documents disclosed to plaintiff by the FBI.

The FOIA and PA permit a citizen to obtain copies of his file without initially specifying what such files relate to. Here, plaintiff received his file. For a District Court to permit the kind of inquiry plaintiff wishes to conduct following complete disclosure by the agency and based on nothing more than plaintiff's broad allegations that other files exist would be improper. This was not

the intention of the disclosure statutes, and the District Court properly granted summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered where there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." See generally Moore's Federal Practice, ¶ 56.15 (1976).

This Court has repeatedly stated that conclusory allegations and the proffer of frivolous possibilities cannot withstand a motion for summary judgment:

Summary judgment, we have often remarked, is a valuable tool for piercing conclusory allegations and disposing of unsupportable claims prior to trial. However, the tool is as dangerous as it is valuable and in the past the fear of substituting trial by affidavit for trial by jury had led us to employ it with some timidity. But just as trial by affidavit represents an unjustified diminution of the rights of plaintiffs, neither courts nor defendants should be subjected to trails which can be little more than harassment.

Applegate v. Top Associates, Inc., 425 F.2d 92, (2d Cir. 1970) (citations omitted). See *Dressler v. Sandpiper*, 331 F.2d 130, 132-33 (2d Cir. 1964). See also *Heyman v. Commerce and Industry Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975).

In *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972) (Friendly, J.), this Court again made it clear that in the face of sworn facts such as contained the Richardson Affidavit, mere allegations will not suffice:

The rule of *Arnstein v. Porter*, 154 F.2d 464, 468 (2 Cir. 1946), that summary judgment may not

be rendered when there is the "slightest doubt" as to the facts no longer is good law. *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Dressler v. MV Sandpiper*, 331 F.2d 130 (2 Cir. 1964). When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts.

Most recently, in *Friedman v. Beame*, 558 F.2d 1107, 1112 n.11 (2d Cir. 1977), this Court stated the rule as follows:

To resist effectively [a motion for summary judgment], Friedman was required to do more than merely rely on the conclusory allegations contained in the affidavit he submitted. Rather he was required to rebut the defense affidavits with opposing affidavits based on the personal knowledge of his affiants.

Here, as the Richardson Affidavit and defendant's un-rebutted Rule 9(g) statement* so state, plaintiff received

* Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York provide as follows:

Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the

[Footnote continued on following page]

his FBI file, and the District Court properly granted summary judgment.

The function of summary judgment, as Chief Judge Kaufman has stated, is to avoid useless trial:

The Federal Rules of Civil Procedure provide several tools to aid in ascertaining the facts before the curtain ascends on a trial, . . . One such "tool" is the Rule 56 summary judgment procedure which enables the court to determine whether the "curtain" should rise at all."

Heyman v. Commerce and Industry Ins. Co., *supra*, 524 F.2d at 1319.

Judge Frankel's decision not to keep "cases like this one alive" in the face of plaintiff's "mere assertion, with no semblance of specificity," (113a), follows the plain language of Rule 56 and this Court's interpretations thereof.

B) The District Court Properly Denied Depositions.

Following defendant's initial motion to dismiss the complaint or, alternatively, for a stay pending the FBI's production of plaintiff's file—which motion was made shortly after the commencement of the action—defendant moved for a protective order staying discovery during the pendency of the dispositive motion, particularly the depositions plaintiff had noticed of four named FBI agents.

material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party *will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.* (Emphasis added.)

At oral argument on June 13, 1977, Judge Frankel stayed all discovery pending the FBI's response to his request that plaintiff's record be produced by June 24, 1977. Following complete production of plaintiff's file, the Court granted defendant's motion for summary judgment and in doing so rejected plaintiff's renewed efforts to depose FBI officials. (See Plaintiff's Motion to Compel Discovery, 56a-58a.) The Court stated its reasons for denying discovery as follows:

The effort to take depositions must be overridden. The mere assertion, with no semblance of specificity, that there may be more records cannot be accepted as a basis for either keeping cases like this one alive or for allowing routinely the interrogation of agency personnel. (113a.)

1. Stay of Discovery Pending Dispositive Motion

Rule 26(c) of the Federal Rules of Civil Procedure gives a District Court Judge broad discretion in issuing protective orders during the pendency of an action to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, . . ." Judge Frankel's initial order—not objected to by plaintiff—staying discovery while defendant's motion to dismiss and plaintiff's motion for partial summary judgment were *sub judice* was clearly within the Court's discretion.

A frequent and logical basis for staying discovery exists where there is a dispositive motion before the Court the decision of which might make all discovery moot. See *e.g.*, *Dunn v. Printing Corp. of America*, 245 F. Supp. 875, 882 (E.D. Pa. 1965); *Klein v. Lionel Corp.*, 18 F.R.D. 184 and 186 (D. Del. 1955) (two opinions). In *Dunn*, the District Court, in ruling on dispositive jurisdictional motions of certain defendant garnishes in a *quasi in rem* jurisdiction case, noted as follows:

[T]he main reason these garnishees asked for a protective order under [then] Rule 30(b) was to avoid the costly and time consuming task of answering depositions since their motion to vacate the writs was filed simultaneously in this Court, and if successful would obviate entirely the need for such discovery.

245 F. Supp. at 882.

In the two *Klein* decisions, the Court stayed depositions and answers to interrogatories pending the disposition of motions by all parties for summary judgment. It said:

There could be no reason to undergo the expense and inconvenience of long depositions for use at the trial until the disposition of the defendants' motion for summary judgment, which might determine the validity of the plaintiff's complaint.

18 F.R.D. at 185.

Here, while dispositive motions were pending and while defendant was endeavoring to produce plaintiff's file pursuant to the Court's request, to have ordered discovery would have been burdensome—a stay of discovery, as Judge Frankel ordered—was proper and certainly within the Court's discretion.

2. Ultimate Denial of Depositions

Following production of plaintiff's file, the Court concluded that plaintiff's "conclusory averment that 'there are other records' cannot be thought to tender a triable issue or to justify the series of depositions he proposes." (111a). Having concluded that the action lacked a triable issue, Judge Frankel correctly granted summary judgment and denied the sought depositions.

C) Plaintiff's Failure to Exhaust Administrative Remedies is a Valid Alternate Ground to Dismiss the Complaint

The District Court concluded that plaintiff's failure to exhaust the administrative remedies provided by law prior to seeking Court enforcement of his alleged FOIA-PA rights reinforced the Court's decision to grant summary judgment and formed an independent ground for dismissal of the complaint. (112a.) Plaintiff now alleges that regulations calling for exhaustion under the PA are without authority and may be ignored. (Appellant's Brief at 8.)

Both the FOIA and the PA contemplate a two-tiered administrative process prior to judicial review under either statute. There is no dispute that plaintiff failed to exhaust his administrative appeal, either prior to commencing the action or after production of his file as the FBI letter accompanying plaintiff's file so advised. Plaintiff now seeks additional files which he alleges exist as well as amendment of records produced. Plaintiff has never requested, however, even an initial administrative amendment of his records; he has never communicated his allegation that other records exist to the agency; and he has certainly not appealed an initial adverse agency decision to the agency head as required by law.

1. FOIA Administrative Remedy

FOIA Administrative Remedy Section 552(a)(6)(A)(i) of 5 U.S.C. sets forth the available appeal where an FOIA request has been denied or not complied with. The relevant regulation requires a requester, prior to pursuing his Court remedies, to appeal such a denial to the Office

of the Attorney General. 28 C.F.R. § 16.7.* No such appeal had been taken by plaintiff prior to the instant action, and defendant moved to dismiss at its inception.

Defendant's motion to dismiss sought, alternatively, a stay of the proceeding pursuant to 5 U.S.C. § 552(a)(6)(C) which permits a court to grant an agency additional time to respond to an FOIA request where the "Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request. . . ." During the additional period, the court retains jurisdiction. The Howard Affidavit, (20a-47a,) set forth the nature of the special circumstances—the huge backlog of requests—and the due diligence exerted by the F.B.I. See *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

Judge Frankel stayed the proceeding and granted defendant until June 24, 1977 to comply with plaintiff's request; the F.B.I. complied on June 14, 1977 in accordance with 5 U.S.C. § 552(a)(6)(C), forwarding plaintiff's file and notifying him of his right to appeal to the Deputy Attorney General.** Following production, plaintiff again ignored his administrative remedies, 5 U.S.C. § 552(a)(6)(A) and 28 C.F.R. § 16.7, moving instead for an order compelling deposition in the District Court.

* In relevant part, 28 C.F.R. § 16.7, entitled "Appeals to the Attorney General from initial denials," reads:

(a) . . . When a request for records has been denied in whole or in part by a head of a division or other person authorized to deny requests, the requester may, within thirty days of its receipt, appeal the denial to the Attorney General; . . .

** The F.B.I.'s June 14, 1977 letter stated as follows:

You have thirty days from receipt of this letter to appeal to the Deputy Attorney General from any denial contained herein. Appeals should be directed in writing to the Deputy Attorney General. . . . (87a)

This Court has stated that where agencies promulgate proper regulations which require agency action prior to court action, failure to exhaust such remedies will justify dismissal:

[P]laintiff . . . is bound by the general rule requiring exhaustion of administrative remedies when Congress has clearly provided an administrative procedure which is capable of resolving the controversy in question.

Marrone v. U.S. Immigration and Naturalization Service, 500 F.2d 418, 410 (2d Cir. 1974) (citations omitted).

Plaintiff argues on appeal that whatever the FOIA may require—he tacitly admits his failure to exhaust FOIA administrative remedies and that defendant's argument thereto was "on solid ground" at page 8 of his brief—the Privacy Act does not require administrative appeal; alternatively, plaintiff argues, such a requirement, if it exists, is overbroad, without force, and therefore, that his request for further disclosure and amendment of documents already disclosed is not subject to an exhaustion attack. He offers no authority for this position.

2. PA Administrative Remedy

a) Access

Section 552a(d)(1) of 5 U.S.C., the Privacy Act, requires that each agency permit an individual access to records kept by the agency pertaining to the individual. Section 552a(f)(2) and (4) empower an agency to promulgate rules to define reasonable requirements for identifying information requested, for consideration of re-

quests for amendment of records and for administrative appeal of adverse agency determinations.*

Section 16.47 of 28 C.F.R.—promulgated pursuant to the specific rule-making authority set forth in 5 U.S.C. § 552a(f) and the general rule-making authority in 5 U.S.C. § 553 ** requires that an individual who has been denied access to his records, appeal that denial to the Office of the Deputy Attorney General. Furthermore, Section 704 of 5 U.S.C., entitled "Actions reviewable," sets forth the General Administrative Procedure Act

* The statute reads as follows:

552a(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall-

*

*

(2) define reasonable times, places and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

*

*

*

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section. . .

** Though plaintiff does not question the validity of 28 C.F.R. § 16.47 on procedural grounds, we note that that regulation was promulgated in accordance with the rulemaking procedure set forth in 5 U.S.C. § 553. The Department of Justice proposed Section 16.47 by notice published in the Federal Register on August 27, 1975 (40 F.R. 39404). The regulation was published in its final form on October 30, 1975 (Order No. 627-75, 40 F.R. 60542).

judicial review prerequisites, providing that final reviewable agency action does not occur until any appeal required by agency rule has been exhausted:

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or *unless the agency otherwise requires by rule* and provides that the action meanwhile is inoperative, *for an appeal to superior agency authority.* (Emphasis added.)

Plaintiff has never communicated to the agency his allegation that additional records exist; he has certainly never appealed any agency action to the Deputy Attorney General. The rule requiring PA administrative appeal

lear:

An individual who has been denied access to records concerning him may appeal that decision to the Deputy Attorney General by filing a written appeal within 30 working days of the receipt of the denial . . .

The appeal shall be marked on its face and on the face of the envelope "Privacy Appeal—Denial of Access," and shall be addressed to the Office of the Deputy Attorney General, . . .

28 C.F.R. § 16.47.

Furthermore, though few Courts have had occasion to enforce the administrative regulations under review, at least one recent unreported decision dismissed an individual's complaint for failure to follow 28 C.F.R. §§ 16.7 and 16.47. In *Kaminski v. United States Civil Service*

Commission, Civ. Dkt. No. 75-458 (W.D.N.Y. June 27, 1977),* the Court, while recognizing plaintiff's ultimate right to obtain the records he sought under the PA, denied the relief on the ground that plaintiff had failed to appeal to the Deputy Attorney General as the regulations required.

b) Amendation

Plaintiff's assertion of his right to correct the records produced is likewise subject to dismissal for failure to exhaust.

Section 552a(g)(1) of 5 U.S.C., entitled Civil Remedies, states as follows:

Whenever any agency

(A) makes a *determination* under subsection (d)(3) of this section not to amend an individual's record in accordance with his *request*, or fails to make such review in conformity with that subsection;

* * * * *

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection. (Emphasis added.)

Regulations promulgated pursuant to 5 U.S.C. §§ 552 (g)(1) and (f)(4), reprinted *supra*, require an appeal to the Office of the Deputy Attorney General following a

* Copies of the decisions in *Kaminski* and *Bosse*, *infra*, both unreported, have been provided by letter to the Clerk of this Court.

refusal to amend records and sets forth specific requirements for such an appeal:

A refusal, in whole or in part, to amend or correct a record may be appealed to the Deputy Attorney General within 30 days of the receipt of notice of the refusal. If the refusal to correct was made by the Office of the Deputy Attorney General, the appeal shall be to the Attorney General. Appeals shall be in writing, shall set forth the specific item of information sought to be corrected, and the individual's documentation justifying the correction. Appeals shall be addressed to the Office of the Deputy Attorney General, . . .

28 C.F.R. § 16.48(c).

In *Bosse v. Levi*, Civ. Dkt. No. 75-1373 (D.D.C., January 26, 1976), the District Court dismissed plaintiff's complaint seeking deletion from his Department of Justice file of allegedly inaccurate information which he claimed would have a negative impact on his future. The Court directed plaintiff to adhere to the administrative remedy set forth in 28 C.F.R. § 16.48 prior to commencing his Court action.

The absence of any administrative appeal by plaintiff is decisive here too, for quite apart from the clear requirements of the statute, the principle that an individual must exhaust his administrative remedies before he seeks review by the courts rests upon the sound policy that an agency should be allowed a full opportunity to apply its particular expertise to the dispute, and, where appropriate, to correct its own mistakes. See *McKart v. United States*, 395 U.S. 185, 193-95 (1969).

Subordinate rules, such as those issued by the Department of Justice and challenged by plaintiff herein,

have long been recognized as appropriate exercise of agency authority. The Supreme Court, in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), stated the principle as follows:

The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

In *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 105 (1946), the Supreme Court reiterated the necessity that federal agencies promulgate the day-to-day rules by which Congressional policy is carried out:

The legislative process would frequently bog down if Congress were constitutionally required to apprise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress *clearly delineates the general policy*, the public agency which is to apply it, and the boundaries of this delegated authority. (Emphasis added.)

See *United States v. Pastor*, 557 F.2d 930, 940-41 (2d Cir. 1977). Having ignored valid agency regulations, plaintiff's claim was jurisdictionally defective. The prin-

ciple that individuals must exhaust their administrative remedies was stated as follows by the Supreme Court:

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. The doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

McKart v. United States, 395 U.S. 185, 193 (1969) (citations omitted). See *Marrone v. U.S. Immigration and Naturalization Service*, *supra*, 500 F.2d at 420; *Best Bearings Co. v. United States*, 463 F.2d 1117 (7th Cir. 1972); *Ogden v. Department of Transportation*, 430 F.2d 660 (6th Cir. 1970). See also *League of United Latin American Citizens v. Hampton*, 501 F.2d 843, 846 (D.C. Cir. 1974). See generally 3 K. Davis, *Administrative Law Treatises* § 20.1 *et seq.* (1958 ed., 1976 Supp.).

In the instant case, the administrative agency has had no opportunity to review plaintiff's failure to appeal to the Office of the Deputy Attorney General, as the regulations require, and his institution and prosecution of this action is to ask the District Court to review matters which have hardly come to the agency's attention and have certainly not been the subject of the required agency appeal.

Judge Frankel, as an alternate ground for dismissing the complaint, rejected plaintiff's efforts to prematurely commence a lawsuit, and stated as follows:

Plaintiff, as he was duly informed, had a right of administrative appeal to the Deputy Attorney General. He has chosen to ignore that right. This is the clearest kind of case for requiring exhaustion of administrative remedies. (112a).

Having been timely notified of the proper administrative remedies and appeal procedures, plaintiff cannot be permitted to ignore those remedies and seek premature judicial intervention, and the District Court correctly so held as an independent basis for dismissing the complaint.

CONCLUSION

The judgment of the District Court should be affirmed.

Dated: New York, New York
February 10, 1978

Respectfully submitted,

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Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
10th day of February 19 78 she served ~~among~~ of the
within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Robert V. Rafter, Esquire
1 North Avenue
Weston, Connecticut 06883

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

10th day of February, 1978

PAULINE P. TROIA
Notary Public, State of New York
No. 11400081
Qualified in New York County
Commission Expires March 29, 1978